CME Group

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July 13, 2020

Via Electronic Submission

Mr. Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street NW
Washington, DC 20581

Re: RIN 3038-AE67 Part 190 Bankruptcy Regulations

Dear Mr. Kirkpatrick:

Chicago Mercantile Exchange Inc. ("**CME**"), on its own behalf and on behalf of CME Group Inc. ("**CME Group**"),[1] of which it is a wholly-owned subsidiary, appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("**CFTC**" or the "**Commission**") notice of proposed rulemaking on Part 190 Bankruptcy Regulations (the "**NPR**").[2]

CME is registered with the CFTC as a derivatives clearing organization ("**DCO**") and is one of the largest central counterparty clearing services in the world. CME's clearing house division ("**CME Clearing**") offers clearing and settlement services for listed futures and options on futures contracts, as well as over-the-counter derivatives transactions, including interest rate swaps products. On July 18, 2012, the Financial Stability Oversight Council designated CME as a systemically important financial market utility under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**"). As a SIFMU, CME is also a systemically important DCO ("**SIDCO**"), subject to the Commission's Part 39 subpart C Regulations.

CME supports the Commission's proposed revisions to modernize the Part 190 Rules and applauds the Commission's thoughtful work in tackling a complex series of rules. We feel the proposed revisions are generally designed to bring clarity and transparency to the Part 190 process and improve customer protections and certainty around a futures commission merchant

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1 As a leading and diverse derivatives market operator, CME Group enables clients to trade in futures, cash and over-the-counter markets, optimize portfolios, and analyze data – empowering market participants worldwide to efficiently manage risk and capture opportunities. CME Group's exchanges offer the widest range of global benchmark products across all major asset classes based on interest rates, equity indexes, foreign exchange, energy, agricultural products, and metals. CME Group offers futures trading through the CME Globex platform, fixed income trading via BrokerTec, foreign exchange trading on the EBS platform, and central counterparty clearing services at CME Clearing, a division of CME. With a range of pre- and post-trade products and services underpinning the entire lifecycle of a trade, CME Group also offers optimization services through TriOptima, and trade processing and reconciliation services through Traiana.

2 *Bankruptcy Regulations*, 85 FR 36000 (June 12, 2020).

(“**FCM**”) or DCO insolvency. We appreciate that the Commission took into consideration the model rules suggested by the Part 190 Subcommittee of the Business Law Section of the American Bar Association (“**ABA Part 190 Subcommittee**”), which were informed by the experiences of the committee members in dealing with past FCM bankruptcies under subchapter IV of chapter 7 of the Bankruptcy Code (“**Code**,” and such a proceeding, a “**subchapter IV proceeding**”) and the Code in general.[3]

I. General Comments

CME supports the broad policy themes reflected in the Commission’s proposal, namely, to modernize Part 190, enhance the overall clarity and transparency of the rules, address a DCO bankruptcy, and above all enhance customer protection. In that regard, CME generally supports the following improvements that the Commission is proposing, subject to our comments below:

- Reorganizing Part 190 into three subparts; adding a general rule explaining the statutory basis for the rules, the core concepts embodied in the rules, and the scope of the rules; and making certain clarifying changes to existing rules to remove ambiguity.

- Clarifying the role of Part 190 in a proceeding involving an FCM that is registered as a broker-dealer with the Securities and Exchange Commission (“**SEC**”) and a member of the Securities Investor Protection Corporation (“**SIPC**”) under the Securities Investor Protection Act (“**SIPA**”) and in a resolution proceeding involving an FCM or a DCO administered by the Federal Deposit Insurance Corporation (“**FDIC**”) under Title II of the Dodd-Frank Act.

- Updating the rules in light of (i) the substantial changes to the CEA regulatory framework that have occurred over the years; (ii) technological developments relating to electronic communications and delivery documents; and (iii) practical considerations derived from experience with prior FCM bankruptcy proceedings, including changes clarifying the trustee’s discretion and allowing the trustee to act as practicable under the circumstances in liquidating or transferring customer positions and other property.

- Allowing the trustee when administering an FCM bankruptcy to treat public customers of the FCM in the aggregate and to rely on the accuracy of its calculations of the funded balances of public customers’ net equity claims as reasonably practicable under the circumstances, which should foster the trustee’s ability to promptly transfer public customers’ positions and their *pro rata* share of customer property to another FCM (or FCMs).

- Providing in the context of an FCM bankruptcy that the assets that the FCM should have set aside to meet its targeted residual interest obligations under Commission Regulation 1.11 to a particular segregated funds pool will be used to cover any shortfall in that pool.

- Providing more detail to facilitate completion of deliveries, outside administration of the bankruptcy estate if possible, under physical delivery commodity contracts that are in a delivery position at the time of the filing or that cannot be liquidated prior to moving into

[3] CME representatives participated in the ABA Part 190 Subcommittee, which provided a proposal for modernizing the Part 190 Regulations to the Commission as part of Project KISS. The ABA Part 190 Subcommittee was formed in 2015 and was comprised of representatives of FCMs, DCOs, exchanges, trade associations and law firms to lend their various perspectives and expertise learned from prior FCM bankruptcies.

delivery position after the filing (limited in the proposed rules to an FCM proceeding, but which we recommend expanding to a DCO proceeding), to mitigate disruption to commercial markets and operations.

- Expanding the delivery account class to cover intangible commodities (including those that are financial in nature such as virtual currencies) as well as tangible commodities and, subject to our comments below regarding the cash and physical delivery property definitions, dividing the account class into a physical delivery account class and a cash delivery account class within which *pro rata* distribution of customer property would occur separately. As a related but separate matter, we recommend that the Commission consider, in a separate rulemaking, the merits of imposing custody requirements or other customer protection requirements with respect to delivery accounts, along with the possibility of further subdividing delivery accounts (and delivery account classes) by underlying asset class or delivery mechanism (*e.g.*, electronic transfer vs. physical load-out).

- Providing greater clarity around standards for letters of credit that FCMs may hold as collateral and treatment of such letters of credit in a bankruptcy proceeding, subject to comments asking the Commission to address special considerations for letters of credit that a customer posts to guarantee its payment for accepting delivery of a commodity under an expiring futures or exercised commodity option contract.

- Providing greater clarity to FCMs regarding designation of hedge accounts and use of delivery accounts. We recommend, though, that the CFTC move those provisions and the others in proposed Regulation 190.10 (books and records, required terms for letters of credit, disclosure regarding non-cash margin) to Part 1 of the Commission's rules. The provisions apply to FCMs during business as usual, and seem misplaced in Part 190, where firms' legal, compliance and operational personnel would not normally think to look for obligations of this type. As noted, we also recommend that the Commission consider further rulemaking around requirements for delivery accounts, but that is independent of this requested change relating to organization of Commission rules.

- Establishing a separate framework in Part 190 that would apply in the highly unlikely event that a DCO becomes the subject of a subchapter IV proceeding or serve as the counterfactual in the highly unlikely event that a DCO is resolved by the FDIC as receiver in a proceeding under Title II of the Dodd-Frank Act. We do, however, have specific comments with respect to assuring the enforceability of a DCO's default rules, including its close-out netting rules, rules setting out the scope of its authority to make calls for assessments or similar payments post-filing, and use of clearing members' guaranty fund deposits. We also recommend expanding the list of items within the scope of customer property to include explicitly the DCO's commitment of its resources under its rules to the financial resources waterfall.

There are number of areas where CME will respond to the Commission's specific requests for comment and some where we request some clarity, as set forth in the following sections.

II. Specific Comments on Proposed Subpart A

A. Proposed Regulation 190.00: Providing Context to Aid Administration

CME supports the addition of Regulation 190.00. The proposed rule provides helpful explanations of the Commission's statutory authority to adopt the rules, Part 190's organization, the core concepts that the rules embody, the scope of the rules, and certain rules of construction. The text, which is generally consistent with the recommendations of the ABA Part 190 Subcommittee, should as intended aid trustees, bankruptcy courts, and other interested parties in understanding the CFTC's rationale for the specific provisions in the other Part 190 rules. The proposed rule may prove particularly useful to a trustee who has little experience with the CEA or the Commission's customer funds segregation rules, as they try to get "up to speed" in the critical early hours and days following the trustee's appointment when the trustee is expected to act quickly on various matters.

CME supports certain policy changes reflected throughout the revisions and described in proposed Regulation 190.00. First, we are in favor of limiting the scope of Part 190 to the bankruptcy of a commodity broker that is an FCM or a DCO, and to commodity contracts that are cleared. To our knowledge, no firms are covered by the commodity option dealer or leverage transaction merchant categories under the definition of commodity broker in Code Section 101(6). Removing provisions in current Part 190 relating to those categories will improve the rules' clarity.

Second, we support separating the delivery account class into a cash delivery account class and a physical delivery account class, subject to our further comments below. The CFTC does not impose segregation requirements on FCMs with respect to the cash or physical delivery property that an FCM holds on behalf of its customers and records in a delivery account. As learned from the *MF Global* bankruptcy, it can be more challenging for a trustee to trace the cash recorded in delivery accounts than to trace physical delivery property. It is our understanding, for example, that the *MF Global* trustee could more readily identify physical delivery property in the form of electronic title documents, compared to identifying non-segregated cash belonging to the delivery account class given the fungible nature of cash. Thus, we think it is appropriate to subdivide the delivery account class as proposed. As noted, though, we also ask the Commission to consider imposing custody or other customer protection requirements with respect to delivery accounts through separate rulemaking. If the Commission were to adopt such rules, it would be appropriate at that time to revisit how the delivery account class should be defined and subdivided in Part 190, but in the meantime the proposed changes would address the challenges described above.

Third, CME agrees that it is important to explain the relationship between a subchapter IV proceeding and a SIPC proceeding involving a firm that is dually-registered as an FCM with the CFTC and as a broker-dealer with the SEC. In practice, in prior SIPC proceedings involving such a firm (*e.g.*, *Lehman* and *MF Global*), the SIPC appointed trustee has followed Part 190 with respect to liquidating the FCM business line, consistent with the requirement under SIPA that the SIPC trustee generally has the same duties as a trustee in a subchapter IV proceeding when the debtor is also a commodity broker.[4] It is beneficial, though, to set out that Part 190 applies to a proceeding commenced under SIPA, to remove any doubt on that point.

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[4] *See* 15 U.S.C. 78fff-1(b) ("To the extent consistent with the provisions of [SIPA] or as otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee in a case under chapter 7 of title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7….").

Fourth, CME supports setting out that Part 190 “shall serve as guidance” to the FDIC as receiver for an FCM or DCO in a proceeding under Title II of Dodd-Frank, with respect to the distribution of customer property and member property. Title II directs the FDIC to apply the provisions of subchapter IV of chapter 7 of the Code with respect to such distributions.[5] We believe it is reasonable to read Title II’s cross-reference to subchapter IV as indirectly bringing Part 190 into the scope of that provision, given the need for Commission rules to give specificity and meaning to the general principles set out in subchapter IV. That said, the statutory language may create ambiguity around whether the FDIC should follow Part 190 as guidance. We understand that CFTC staff has consulted with FDIC staff in developing the proposed revisions to Part 190. CME trusts that the FDIC has confirmed to Commission staff that it would look to Part 190 for guidance.

Finally, as noted, CME supports adding a separate framework for a DCO bankruptcy. CME believes it is useful to include in proposed Regulation 190.01 explanations of relevant core concepts for such a proceeding. In particular, it aids understanding to explain how the distinction between the public customer class and non-public customer class is reflected at the DCO-level in the distinctions made between customer accounts and house accounts and between the two categories of customer property – customer property other than member property and member property – that are available to satisfy the net equity claims of each. CME further agrees that in the highly unlikely event of a DCO bankruptcy the public customer class should receive preferential treatment over the non-public customer class in satisfaction of their respective net equity claims. The rules of CME Clearing in fact provide for such preferential treatment.

However, as explained more fully below, it is inappropriate and we believe exceeds the Commission’s authority for the Commission to propose rules dictating how to apply the guaranty fund deposits of clearing members in a DCO bankruptcy, in disregard of DCO rules that prescribe the scope of mutualized losses to which clearing members’ guaranty fund deposits will be applied. The DCO’s rules form the contract between and among the DCO and its clearing members. Clearing members carefully evaluate those rules to understand the financial obligations they assume and expect the DCO’s rules to be enforced as written, especially when they are properly adopted by a DCO subject to Commission oversight and rule filing procedures. If the Commission wishes to achieve a different policy outcome on how guaranty fund deposits are applied, the proper course is for the Commission to seek to implement that through rulemaking to amend Part 39. That would allow for more fulsome consideration and debate by the industry around the issues and assure that the requirements apply to all DCOs, not just to U.S. DCOs alone – as would be the effect of using this NPR to rewrite how DCO rules apply in a DCO bankruptcy event.

B. Proposed Regulation 190.01: Comments on Certain Definitions

Overall, CME believes the revised definitions are useful. There are a small number of definitions, though, where we recommend changes.

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[5] Title II provides that when the company being liquidated is a commodity broker, the FDIC is required to apply the provisions of subchapter IV “in respect of the distribution to any customer of all customer property and member property,” as if it were a debtor for purposes of subchapter IV.12 U.S.C. § 5390(m)(1)(B).

1. *Account Class and Related Definitions*

The proposed account class definition covers the futures account class, foreign futures account class, cleared swaps account class, and delivery account class, and contains a separate definition for each.

Futures, foreign futures and cleared swaps. The futures account class, foreign futures account class, and cleared swaps account class are each defined via cross-reference, respectively, to the definitions of "futures account" in Regulation 1.3, "30.7 account" in Regulation 30.1, and "cleared swaps customer account" in Regulation 22.1. Each of those definitions by its terms only covers segregated accounts of public customers. Those account class distinctions are also relevant, though, for the non-public customer class, *i.e*., for holders of proprietary accounts carried by FCMs and for clearing members' house accounts carried by DCOs. Thus, we ask the Commission to expand the definitions to cover accounts of non-public customers.[6]

Delivery account class. CME agrees with the proposed definition of delivery account class. We are in favor of expanding the delivery account class to cover intangible commodities (through the definition of cash delivery property) and dividing the account class into a physical delivery account class and a cash delivery account class, within which *pro rata* distribution of customer property would occur separately.

That said, we recommend that the Commission address through separate rulemaking the broader issues around whether customer property carried in delivery accounts should be subject to any special customer protections, such as requirements that FCMs should hold such property in custody accounts or limitations on how long cash or cash equivalents should be held in delivery accounts that are not subject to custody requirements.[7] As part of those deliberations, we encourage the Commission to consider the possibility of establishing separate delivery accounts by underlying asset class or delivery mechanism, *e.g.*, electronic or book entry transfer versus actual load out of a particular commodity such as oil. We believe that any such rules fit best in the Commission's Part 1 Regulations and not in Part 190. The Part 190 provisions relating to the delivery account class should, of course, be consistent with any such rules the Commission may ultimately adopt. Thus, the Commission may have to revisit the delivery account class definition, and any appropriate subdivisions within the account class, along with the definitions of cash delivery property and physical delivery property definitions, based on the outcome of such a rulemaking.

2. *Cash Delivery Property and Physical Delivery Property Definitions*

The proposed definitions are important for implementing the separation of the delivery account class into the cash delivery account and physical delivery account classes, as they delineate the customer property that is available to distribute to customers in each account class. CME agrees that cash delivery property should include cash or cash equivalents recorded in a customer's delivery account as of the filing date, along with any physical delivery property subsequently received in accepting a delivery, and likewise that physical delivery property should include any cash delivery property received subsequent to the filing date in exchange for making a delivery. We have specific comments, though, on each definition.

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[6] The Commission should consider the definitions proposed by the ABA Part 190 Subcommittee, which had that broader scope.

[7] We believe the Commission has the authority to adopt such a rule pursuant to its anti-fraud authority under CEA Section 4b and its plenary authority to regulatory regulate commodity options under CEA Section 4c(b).

Cash delivery property. To qualify as cash delivery property under the proposed definition of this term, cash or cash equivalents recorded in the account as of the filing date cannot be posted earlier than three calendar days preceding the first notice date (relevant for futures) or exercise date (relevant for options). We recognize that this limitation is based on one in current Part 190, but it does not make sense and if not eliminated from the definition could be detrimental to customers, contrary to the goal of enhancing customer protections.

When a customer posts cash or cash equivalents to its delivery account in anticipation of paying for an upcoming delivery or to guarantee its obligation to take delivery, the timing of the payment should not matter. As the Commission well knows, delivery is not a process a customer undertakes lightly and if the parties intend to make and take delivery, CME believes the trustee should be able to follow the customers' intention. A customer is unlikely to leave cash in an unsegregated delivery account with an FCM for any extended time, without reason, when it would be better protected by holding the cash in a segregated account or withdrawing the cash if not needed to meet upcoming delivery obligations. There can be times, though, when a customer will legitimately post cash to its delivery account sooner than the definition would allow, for example, out of caution to assure that the necessary funds are available to pay for a delivery when the first notice date or exercise date immediately follows a weekend or holiday, or to meet payment deadlines imposed by the FCM, or based on market convention. We understand that some FCMs may require customers to post cash sooner than 3 days prior to the relevant notice or exercise date, as applicable, to satisfy a delivery-related obligation. It is potentially disruptive to the delivery process to deny the customer the protection of having its funds classified as cash delivery property because it posted the cash or cash equivalents needed to complete an upcoming delivery too soon.

Also, the timing element does not make sense with respect to cash recorded in a customer's delivery account as of the filing date, which the customer had previously received as payment for delivering a commodity under an expired or exercised contract. We do not believe the Commission intended for the timing limitation to apply to this situation, but the proposed definition does not exclude such cash from the requirement.

We understand that the Commission is proposing to keep the timing limitation to encourage FCMs and their delivery customers to hold cash intended to pay for a delivery in a segregated account until bilateral delivery obligations are near at hand. We appreciate that policy objective, but we question whether the limitation is effective in encouraging the desired behavior, in particular when it is contained in bankruptcy regulations and parties with delivery obligations may not necessarily be aware of it. In our view, the Commission should address protection of customer property held in delivery accounts in a more direct and transparent matter, through separate rulemaking as we recommend.

For the foregoing reasons, we ask the CFTC to revise the cash delivery property definition to remove the limitation that cash delivery property must be recorded in the delivery account no sooner than three calendar days before the first notice date or exercise date.

We also ask the Commission to expand the definition to allow for the possibility that a customer may be unable to post funds needed to pay for a delivery in advance of the filing date, so that the definition would also cover cash delivery property received after the filing date in anticipation of taking delivery of a commodity. Significantly, as we have seen with other FCM bankruptcies, the days prior to actual filing can be chaotic and customers may not have had the opportunity to meet such a deadline. To allow the delivery to be completed reduces a potential disruptive situation to commodities markets during an otherwise tumultuous time.

Finally, as a technical change, we ask the Commission to clarify in the definition that for a commodity contract that settles by delivery of a foreign currency as the underlying commodity or by an exchange of a pair of currencies, the USD or foreign currency recorded to a delivery account in connection with either side of the delivery constitutes cash delivery property.

Physical delivery property. The proposed definition of physical delivery property incorporates elements of the current definition of specifically identifiable property relating to deliveries, in updated form to recognize that delivery under many physical-delivery contracts is accomplished by means of electronic or book entry transfer of electronic warehouse receipts, shipping certificates or other similar documents, or of assets that themselves exist in electronic form. CME supports modernizing the definition to recognize the use of electronic delivery documents in effecting deliveries under physical delivery commodity contracts.

We ask the Commission, though, to expand the physical delivery property definition to cover within its scope any cash or cash equivalents that a seller may deposit in its delivery account when its obligation to deliver physical delivery property under an expiring futures or exercised options contract also includes an obligation to make a cash payment to the buyer, as could arise if the contract's final settlement price is negative. We appreciate that this scenario would be unprecedented and may never occur, but it seems prudent to contemplate the possibility in light of recent events where certain physical-delivery oil futures contracts traded below zero in the days prior to establishment of the final settlement prices.

We also ask the Commission to please make a technical correction to the definition relating to the fact that shipping certificates are not electronic title documents, and instead represent the contractual obligation of a facility to deliver the underlying commodity to the buyer. Thus, for clarity we recommend that the Commission revise the phrase "including warehouse receipts, shipping certificates or other documents of title (including electronic title documents) for the commodity" to read "including warehouse receipts, shipping certificates or *other similar documents* (including electronic *versions thereof*)."

3. House Account Definition

CME agrees with expanding the current definition to cover the house accounts that DCOs maintain for clearing members. The Commission is also proposing to revise the definition as it applies to an FCM, in a manner that would cover any proprietary account of the FCM, and not just the FCM's own account as under the current definition. We note that "house account" is used in only three places for an FCM proceeding.[8] We wish to confirm that the Commission intended to expand the scope of these provisions in each case. If so, it would seem more direct for the Commission to modify those three provisions to clarify that they apply to proprietary accounts of FCMs, and to limit the defined term to house accounts maintained by a DCO for clearing members.

4. Public Customer and Non-Public Customer Definitions

[8] They are: (i) proposed Rule 190.06(a)(5), which addresses deliveries made or taken with respect to the debtor FCM's house account under open commodity contracts; (ii) proposed Rule 190.07(c), which prohibits transfer of the debtor FCM's house account after the filing date; and (iii) proposed Rule 190.08(b)(2)(vii), which provides that when a non-debtor FCM maintains an omnibus account and a house account with a debtor FCM, it holds the accounts in a separate capacity for purposes of calculating its net equity claims against the debtor FCM The corresponding provisions in current Part 190 are found, respectively, in Regulations 190.05(c)(3), 190.06(e) and 190.07(b)(2)(ix).

CME finds the proposed definition of the term public customer, along with the related definition of the term non-public customer, to be much more understandable than the current definitions in Part 190, and supports the new definitions. CME asks the Commission, though, to reconsider the recommendation of the ABA Part 190 Subcommittee to include non-U.S. customers of foreign broker clearing members of a DCO within the public customer definition. As the Commission knows, CME has considered admitting foreign brokers as clearing members to clear trades of their non-U.S. customers in futures or options on futures listed on the CME or the other designated contract markets ("**DCMs**") owned by CME Group, which would be analogous to a foreign clearing organization admitting FCMs as members to clear trades of their public customers in futures or options on futures listed by a foreign board of trade. While that model does not currently exist for U.S. DCOs and the DCMs for which they provide clearing services, it seems appropriate to include flexibility in Part 190 to accommodate that possibility.

5. Variation Settlement Definition

CME supports adding a definition for the term variation settlement. Under the proposed definition, variation settlement would mean "variation margin" as defined in CFTC Regulation 1.3, along with "all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract." CFTC Regulation 1.3 defines "variation margin" to mean "a payment made by a party to a futures, option, or swap to cover the current exposure arising from changes to the market value of the position since the trade was executed or the previous time the position was marked to market." CME generally agrees with the substance of the definition, but we think it would be more direct and would promote greater clarity to use a self-contained definition that does not rely on cross-reference to another Commission definition. Thus, CME asks the Commission to reconsider using the definition proposed by the ABA Part 190 Subcommittee. That definition covered "any amount paid or collected (or to be paid or collected) on an open commodity contract relating to changes in the market value of the commodity contract since the trade was executed or the previous time the commodity contract was marked to market along with all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract."

C. Proposed Regulation 190.02: Exemptions from Procedural Requirements and Allowing an FCM Receiver to Put the FCM in Bankruptcy

CME generally supports proposed Regulation 190.02, including adding a provision that would allow the trustee to request exemption from procedural requirements of the rules. CME is also in favor of adding the proposed provision to clarify that a receiver appointed for an FCM due to segregation or net capital violations may, in an appropriate case, file a petition for bankruptcy of the FCM pursuant to Section 301 of the Code.

III. Specific Comments on Proposed Subpart B

A. Proposed Regulation 190.03: Communicating with Customers, Facilitating Transfers and Treatment of Hedge Positions and Claims Process

CME supports giving the trustee the flexibility, in consultation with the Commission, to establish appropriate procedures for giving notice to customers, including the use of a website and customers' electronic addresses, moving away from the outdated and impractical notice requirements in current Part 190 (*e.g.*, publishing notices in daily newspapers). The changes align with how the trustees in recent FCM cases have communicated with the FCM's customers and are more customer-friendly.

CME fully endorses the policy preference reflected in the Code, current Part 190, and the proposed revisions to Part 190 that the trustee should use their best efforts to transfer all public customer positions and related customer property from the debtor FCM to one or more other FCMs. Accordingly, CME supports the provisions in proposed Regulation 190.03(c) that grant the trustee the discretion not to have to treat customer positions carried in hedge accounts as specifically identifiable property, unless the trustee determines that doing so would be practicable under the circumstances, following consultation with the Commission. This change will allow the trustee to devote their attention to transferring open positions of all public customers, along with their proportionate share of the customer property, in the aggregate, without the distraction of having to address specific instructions from individual customers.

CME believes it is important for the claims process to be as easy to navigate as possible for the customers of the debtor FCM, without feeling compelled to hire counsel to decipher the requests for information they must provide to establish their net equity claims. In this regard, paragraphs (e) and (f) of proposed Regulation 190.03, and the proposed template proof of claim form included as Appendix A, are major improvements over the current rules and proof of claim template. CME also supports giving the trustee the flexibility to tailor the proof of claim form to request information of customers as appropriate under the circumstances.

B. Proposed Regulation 190.04: Continued Operation of the Debtor's Estate and Treatment of Letters of Credit, Including Delivery Letters of Credit

CME supports the general concept of providing the trustee for a debtor FCM with significant flexibility to operate the FCM. We especially favor any provision that encourages the transfer of customer positions and property and continuation of margin payments on behalf of the debtor FCM pending transfer or liquidation of positions.

We appreciate that proposed Regulation 190.04(c) directs the trustee to use their best efforts to liquidate open physical delivery commodity contracts that have not been transferred before the contracts move into a delivery position, which we believe would avoid unnecessary disruptions to the delivery process by customers that did not intend to participate in making or taking delivery.

With respect to proposed treatment of letters of credit, CME supports granting the trustee the power to require a customer to deliver substitute customer property to the estate and allowing the trustee to draw on the letter of credit if the customer does not post additional collateral, provided that those conditions apply only to letters of credit letter that are received, acquired or held to guarantee or secure a customer's obligations under open commodity contracts and do not apply to delivery letters of credit. Customers routinely post letters of credit in connection with delivery obligations under certain physical delivery futures contracts held to maturity. This is the case, for example, for deliveries under certain oil futures listed on the New York Mercantile Exchange ("**NYMEX**"). The buyers are required to post collateral for the full payment amount owed because actual delivery is effected via physical transfer of oil and thus is typically completed 30 days or so after buyers and sellers are matched for bilateral delivery obligations. Given the substantial dollar amounts involved, often hundreds of millions, letters of credit are often posted as collateral and it would cause substantial liquidity hardship for the buyer to have to substitute cash for the letter of credit in this delivery scenario. The delivery letter of credit is not a decaying asset and does not pose the same issues that the Commission encountered in the *MF Global* bankruptcy. Thus, we ask the Commission to revise proposed Regulation 190.04(d)(3) to exclude delivery letters of credit, *i.e.*, letters of credit posted by buyers to guarantee their payment for commodities they are contractually obligated to purchase under an expired futures or exercised commodity option contract.

We also appreciate the certainty contained in Proposed Rule 190.04 that a letter of credit posted to secure obligations under open commodity contracts (whether drawn upon or not) must be deemed as part of the customer's property, in addition to any additional collateral posted by the customer, for purposes of distribution calculations. We also agree it is prudent to make clear that the trustee in either an FCM or DCO bankruptcy can draw upon posted letters of credit. With respect to a delivery letter of credit posted as collateral to secure the customer's obligation to pay for delivery of a commodity it will receive, it is critically important that the letter of credit be available to draw upon if the customer defaults or is expected to default on its obligation to pay the seller. The value available to CME under such a letter of credit is wholly independent from the solvency of an FCM, unlike a letter of credit posted as performance bond which decays when utilized to meet margin or variation calls post-FCM bankruptcy. A trustee's decision to request substitute collateral for a delivery letter of credit would create a sudden and unexpected liquidity need for the delivery participant and introduce unnecessary strain into physical and derivatives markets. As such we ask that the Commission limit or eliminate the trustee's powers to request that a market participant substitute other forms of collateral for a delivery letter of credit upon which the DCO is a beneficiary.

C. Proposed Regulation 190.05: Funded Balances, Ongoing Compliance with CEA and CFTC Requirements, and Residual Interest

CME agrees with the proposal to allow the trustee to compute the funded balance for customers' accounts before transferring or liquidating customer positions or property using "reasonable efforts" to be "as accurate as reasonably practicable under the circumstances, including the reliability and availability of information." We concur with the Commission that this should allow the trustee to act more promptly to transfer positions of public customers and their *pro rata* share of the customer property than if the trustee were held to a strict standard of precision in calculating funded balances before it could undertake such transfers.

CME also supports adding the clarity that the trustee should use reasonable efforts to operate the debtor FCM's estate in compliance with the CEA and CFTC rules governing FCMs, including to apply the residual interest provisions in CFTC Regulation 1.11, "in a manner appropriate to the context of their responsibilities … and in light of the existence of a surplus or deficit in customer property available to pay customer claims."

D. Proposed Regulation 190.06: Deliveries Outside Administration of the Debtor's Estate and Letters of Credit Posted Directly with a DCO

CME is supportive of the proposed enhancements to the delivery account class, including separating the account class into physical and cash delivery account classes, subject to our comments above requesting changes to the cash delivery property and physical delivery property definitions.

We appreciate that the proposed rules provide more detail for the trustee on how to facilitate completion of deliveries. In particular, we support the provisions requiring the trustee to use reasonable efforts to allow delivery to occur *outside administration of the debtor FCM's estate* when the rules of the relevant exchange or DCO prescribe a process for allowing deliveries to be accomplished in the normal course directly by customers, by substituting the customer for the debtor FCM, or by agreement of the buyer and seller to alternative delivery procedures. We ask the Commission to confirm our understanding that when a customer posts a delivery letter of credit directly with the DCO or with its delivery counterparty, and not with or through the FCM, the letter of credit is outside the delivery account class, *i.e.*, it does not constitute cash delivery property (or property of the debtor's estate), and the provisions in other parts of the proposed revisions regarding treatment of letters of credit posted with or through the debtor FCM do not apply.

CME also supports adding the clarification that cash or cash equivalents held by the debtor FCM in an account maintained at a bank, DCO, foreign clearing organization or elsewhere constitutes customer property when it is held under a name or in a manner clearly indicating the property in the account relates to deliveries. CME believes that this will facilitate identifying cash delivery property available to distribute to customers in the cash delivery account class. That said, as explained above, we encourage the Commission to consider adopting more formal requirements with respect to delivery accounts through separate rulemaking.

E. Proposed Regulation 190.07: Facilitating Transfers

CME supports the provisions in proposed Regulation 190.07 that assign the customer agreements of the debtor FCM to a receiving FCM by operation of law and that allow a receiving FCM to accept transfers prior to conducting its own customer due diligence, in reliance on the diligence completed by the debtor FCM on a transitional basis. These practical changes should facilitate efforts to find FCMs willing to accept the transfers of public customer accounts from the debtor FCM.

CME also agrees that transfers should be made consistent with sound risk management principles, and in that regard welcomes the proposed clarification that the requirements under the proposed rule do not limit the rights of a DCO (or a DCM or swap execution facility as "registered entities" as defined in the CEA) to liquidate or transfer open commodity contracts. CME is also supportive of adding the provision that requires the trustee to use reasonable efforts to prevent the separation of physical delivery property from commodity contracts under which the property is deliverable.

F. Proposed Regulation 190.08: Valuing Transferred Positions

CME agrees that for purposes of calculating a customer's net equity claim, open commodity contracts that are transferred should be valued using the values determined at the end of the last settlement cycle on the day preceding the transfer. This approach will also align with how the trustee calculates the customer's interim funded balance in connection with transfers under proposed Regulation 190.08(c). If the contracts are transferred to the receiving FCM or FCMs using the prior cycle's settlement prices as the trade prices, any mark-to-market gains or losses on the date of the transfer should be reflected by the receiving FCM(s) in the customer account statements as a result of that day's settlement cycle.

G. Proposed Regulation 190.09: Residual Interest as Customer Property

CME believes that it is a substantial improvement over the current rule defining the scope of customer property to expressly include the assets that the debtor FCM was required to place into segregation to cover undermargined customer balances or to meet its targeted residual interest requirements under Regulation 1.11. The current rule includes a provision that deems any cash, securities or other property in the debtor's estate to be customer property to the extent that customer property under the other definitional elements is insufficient to satisfy in full all claims of the FCM's public customers. As the Commission knows, relying on that provision alone to fill a hole in segregated property is vulnerable to legal challenge as happened in the *Griffin Trading* bankruptcy. This new provision, in contrast, would cover assets of the debtor FCM well within the definition of customer property under Code Section 761(10), as "other property of the debtor that any applicable law, rule, or regulation requires to be set aside or held for the benefit of a customer."

H. Proposed Regulation 190.10: FCM Business as Usual Obligations and Proposal to Move the Requirements to Part 1

CME supports allowing FCMs during business as usual to designate a customer's account as a hedge account in reliance on a customer's representation that the account carries hedge positions, as set out in proposed Regulation 190.10. CME also supports adding the proposed clarity (lacking in the current rule) that positions constitute hedging "as such term may be defined under any relevant Commission regulation or rule of any clearing organization, designated contract market, swap execution facility or foreign board of trade."

We also support providing greater clarity to FCMs regarding use of delivery accounts, to confirm that when delivery occurs outside a segregated account or, as applicable, a securities account, the delivery must occur in a delivery account, but as recommended above we also ask the Commission to consider adopting custody or other customer protection requirements with respect to delivery accounts via separate rulemaking.

We agree with the additional terms that must be included in letters of credit that FCMs accept. We also support the Commission's proposal to allow FCMs a one-year transition period after Part 190 amendments are final to re-draft their existing forms of letters of credit and collect new forms from the customers.

Finally, we ask the Commission to incorporate the terms in proposed Regulation 190.10 into one or more new or existing rules in Part 1, where they will be more transparent and more logically fit, as they set out obligations that apply to FCMs during normal business circumstances.

IV. Proposed Subpart C Comments

A. Proposed Regulation 190.11: General Support for Subpart C

CME supports the Commission's goal of establishing a baseline set of principle-based rules for a commodity broker liquidation of a DCO in a subchapter IV proceeding. CME also appreciates the value that such rules could provide to the FDIC, if it were called to resolve a DCO in a proceeding under Title II of the Dodd-Frank Act, to guide the FDIC's distribution of member property and customer property other than member property to the DCO's clearing members in respect of their net equity claims for their house and customer accounts.

No DCO has ever become the subject of a bankruptcy proceeding, and we believe the likelihood of that ever happening is extremely remote. Nonetheless, it is prudent for the Commission to establish explicit rules that are tailored to the bankruptcy of a DCO. In the highly unlikely event of a DCO bankruptcy under a subchapter IV proceeding, the trustee would likely find it daunting to make sense of the current rules, which are largely designed for an FCM bankruptcy, to discern the appropriate actions to take or how to calculate clearing members' net equity claims for their customer and house accounts or how to allocate and distribute customer property to pay such claims. (In practical terms, subpart C is relevant for a U.S. DCO; we think it is more likely a bankruptcy or resolution proceeding involving a non-U.S. DCO would be handled in a main proceeding outside the U.S.)

We appreciate that the NPR gives deference to each DCO's default rules and its recovery and wind-down plans. Each clearing member joins a particular DCO subject to the rules that have been filed with the Commission. The rules constitute the contract between the parties and the terms by which a clearing member assumes the mutualized risk of clearing house participation. Thus, ensuring that those rules will be followed in the highly unlikely event of a DCO insolvency provides certainty to clearing members. It is important that the Commission's proposed subpart C rules give effect to the DCO's rules as written, including close-out netting rules, assessment and loss allocation rules, and rules prescribing how clearing members' guaranty fund deposits are applied.

Clearing members rightfully expect that the DCO's rules are legally enforceable, as binding contractual obligations, and all-the-more-so as ones that a DCO has adopted subject to the Commission's oversight and review of DCO rule filings. As the Commission knows, a DCO is required to adopt rules, subject to the DCO's reasonable discretion, for the DCO's compliance with the core principles set out in CEA Section 5b and the detailed requirements set out by the Commission in Part 39.

Even though a DCO's recovery and wind-down plans are not public, it is appropriate to give deference to them. A DCO subject to subpart C of the Commission's Part 39 Rules, such as CME Clearing, must maintain recovery and wind-down plans as required under CFTC Regulation 39.39, and such plans are reviewed by the Commission pursuant to CFTC Regulation 39.19. Moreover, the plans do not amend the DCO's default rules; rather, they set out the script that the DCO would expect to follow, to implement the DCO's rules in accordance with their terms.[9]

B. Proposed Regulation 190.12: Furnishing Records

CME agrees that the reports and records identified in proposed Regulation 190.12 would be useful for the trustee and Commission, and that certain of the items should be furnished as soon as possible, in particular current versions of the DCO's default rules and any recovery and wind-down plans. The DCO should use every effort to provide such records within three hours of the commencement of the proceeding (or appointment of the trustee in an involuntary case), as proposed.

C. Proposed Regulation 190.13: Protecting Transfers

CME supports proposed Regulation 190.13 to protect both pre- and post-relief transfers from avoidance under the Code. CME has no objection to the Commission's proposal that would

[9] The plans describe CME's internal deliberative processes, personnel information, financial resources and commercial information, which CME appropriately treats as confidential information, consistent with standard business practices of other systemically important financial institutions. All CME recovery actions that could impact clearing members or customers are established in CME's publicly available rulebook.

allow post-relief approval after the transfer. As the Commission is well-aware, porting to another DCO would be preferred and to the extent the DCO may need to act quickly it is appreciated that approval can be obtained after the fact to protect the transfers.

D. Proposed Regulation 190.14: Continued Operation of the DCO and Enforceability of Close-Out Netting

CME supports granting the trustee the discretion under proposed Regulation 190.14(a) to instruct customers to file proofs of claim containing information the trustee considers appropriate, and to seek a court order establishing a bar date for filing proofs of claim.

CME understands the Commission's caution, reflected in proposed Regulation 190.14(b), around the issue whether the trustee, standing in the shoes of the DCO, should suspend or continue making calls for variation settlement and initial margin. The Commission is proposing that the trustee may continue operating the DCO (for up to six days) with the Commission's approval, only if it is feasible to expect that the DCO's operations could be transferred to another DCO or that the DCO will become subject to a resolution proceeding under Title II of Dodd-Frank. In addition, as proposed, the Commission could approve continued operation of the DCO only if practicable in the sense that the DCO's rules do not compel termination of all or substantially all of the outstanding contracts under prevailing circumstances and that substantially all of the clearing members (other than those subject to a bankruptcy proceeding) are willing and able to make variation payments owed.

CME suggests that the Commission consider a more flexible approach whereby the trustee could continue operating the DCO on a temporary basis, with the Commission's approval, as appropriate more generally under the circumstances, provided that such action accords with the DCO's rules and does not affect close-out netting rules. Circumstances could conceivably arise where performing daily settlement cycles could help mitigate the spread of systemic risk to other DCOs through clearing members they have in common with the debtor DCO, by allowing variation payments to continue to flow through the debtor DCO, pending *termination* as well as potential transfer of open commodity contracts.

Under either approach, it is critical that any decision to continue operating the DCO not be contrary to the DCO's rules or be construed in any way to abrogate clearing members' close-out netting rights under the rules. Clearing members place paramount importance on enforceability of their close-out netting rights under the DCO's rules, as part of their contract with the DCO. Indeed, CME and other DCOs have obtained detailed legal analyses on the enforceability of their close-out netting rules and other features of their default rules to assure clearing members of their rights.

Some have expressed concern that proposed Regulation 190.14(b) creates uncertainty around enforceability of close-out netting rules if the trustee is allowed to continue the DCO's operations under the conditions as drafted. We do not think the proposed rule creates an issue with respect to CME's close-out netting rules or netting opinion, as our rules (most notably, Rule 818) would compel termination of open contracts upon a CME bankruptcy event, and thus the conditions of Regulation 190.14(b) would not be satisfied and the trustee could not continue CME's DCO operations. Other DCOs, though, could potentially have rules that permit a clearing member to terminate open positions at their discretion without compelling termination.

To address the ambiguity under proposed Regulation 190.14(b) and protect close-out netting under a DCO's rules, we respectfully ask the Commission to add a provision to the proposed rule to the effect that if the Commission permits the trustee to continue to operate the DCO, that action is not in derogation of, and clearing members fully retain and may exercise, their rights under the DCO's rules and procedures with respect to close-out netting. It is also important to provide such clarity should the Commission decide to adopt the more flexible approach we suggest.

E. Proposed Regulation 190.15: Deference to DCO Default Rules and Recovery and Wind-Down Plans

CME supports the proposal in Regulation 190.15(a) to protect actions taken by a debtor DCO reasonably within the scope of and provided for in its recovery and wind-down plans by prohibiting the trustee from seeking to avoid or prohibit such actions.

CME also agrees, as proposed in Regulation 190.15(b), that the trustee, in consultation with the Commission, should implement the DCO's default rules and procedures, along with any termination, close-out and liquidation provisions in the DCO's rules. We understand that the trustee may need reasonable discretion in implementing the default rules to the extent practicable. Consistent with our comments above, it is important for the proposed subpart C rules to support enforceability of close-out netting rules.

We are also in favor of setting out in proposed Regulation 190.15(c) that the trustee, in consultation with the Commission, should take actions in accordance with any recovery and wind-down plans of the debtor DCO that were filed with the Commission pursuant to CFTC Rule 39.39, to the extent reasonable and practicable.

F. Proposed Regulation 190.16: Deliveries

CME supports including a rule that requires the trustee to use reasonable efforts to facilitate deliveries on behalf of a clearing member or its customer. The proposed rule, though, only applies to commodity contracts that moved into delivery position prior to the date and time of the order for relief. It is possible, though, that commodity contracts could move into delivery position after that point in time. We agree that the trustee should use its best efforts to terminate such contracts before delivery obligations are triggered, but that may not always be possible. It is equally important to protect deliveries under contracts that move into delivery position after the filing and that the trustee is unable to liquidate, to protect against disruption to commercial markets and operations. Thus, we ask the Commission to please expand the rule to require the trustee to facilitate deliveries under such contracts as well.

G. Proposed Regulation 190.17: Applying DCO Loss Allocation Rules to the Calculation of House Net Equity Claims

CME supports the proposal in paragraph (b) to apply the DCO's loss allocation rules and procedures, including the DCO's default rules and procedures, to the calculation of clearing members' net equity claims, provided that it is clear that such rules and procedures will be applied in accordance with their terms. In this regard, we note that the follow-on statement that "[t]his includes, with respect to the clearing member's house account, any assessments or similar loss allocation arrangements provided for under those rules and procedures that were not called for before the filing date, or, if called for, have not been paid" creates some ambiguity.

In context, we believe the correct way to interpret the provision is that the house net equity claims will be adjusted only if and to the extent the clearing member has obligations under the

DCO's rules to make such payments following a bankruptcy event of the DCO. As explained above, and as the Commission acknowledges in the NPR, the DCO's rules are the contract between and among the members and the DCO. To us, this means they should be given effect as written. We ask the Commission to revise Regulation 190.17(b) to clarify that "full application" of the DCO's loss allocation rules and procedures to the calculation of clearing members' house net equity claims means that assessments or similar loss allocation arrangements thereunder are part of the calculation only if and to the extent that the DCO's rules and procedures provide for post-filing assessments and payments. If the calculation of net equity claims deviates from the DCO's loss allocation under its rules, including determination of amounts owed under close-out netting rules, that could adversely affect CME's netting opinion as to the enforceability of its netting rules in all respects.

CME supports giving effect to provisions in the debtor DCO's loss allocation rules that entitle clearing members to return of guaranty fund deposits or other mutualized default resources that are not used, or to payments out of amounts that the DCO recovers on claims against a defaulting clearing member, through adjustments to clearing members' net equity claims against member property to reflect their entitlement to such payments.

H. Proposed Regulation 190.18: Scope of Customer and Member Property, Treatment of Members' Guaranty Fund Deposits and Covering a DCO's Financial Commitments

CME agrees that it is useful to set out the various elements that comprise customer property in proposed Regulation 190.18(b), and that the scope of customer property should include any "guaranty fund deposit, assessment, or similar payment or deposit made by a clearing member, or recovered by the trustee, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of a member available under the debtor's rules and procedures to satisfy claims made by or on behalf of public customers of a member."

CME disagrees, though, with the proposal in Regulation 190.18(c)(1) that such guaranty fund deposits, assessments or similar payments must be allocated to customer property other than member property, for use to cover a shortfall in the funded balances for clearing members' customer accounts in ***any*** account class, without regard to how the DCO's rules prescribe that such guaranty fund deposits be applied to cover losses. This feature is a material change to the definition of member property in current Regulation 190.10, under which any guaranty funds remaining after payments ***in accordance with the DCO's rules*** would be returned to clearing members as member property. If adopted, it would undermine CME's carefully crafted rules limiting use of clearing members' guaranty fund deposits to cover losses in the relevant product class to which they have contributed to the guaranty fund and in which they participate and may significantly alter how clearing members assess the risks they have assumed in joining CME.

Moreover, adoption of such a rule will compromise CME's ability under Regulation 39.27 to "operate pursuant to a well-founded, transparent, and ***enforceable*** legal framework that addresses each aspect" of CME's obligations as a DCO, including netting arrangements and "other significant aspects" of CME's "operations, risk management procedures, and related requirements" as a DCO.

We understand that the Commission has authority under Section 20 of the CEA to define the scope of what is included in or excluded from "member property," but that authority is not open-ended and must be exercised in a manner consistent with the provisions of subchapter IV of chapter 7 of the Code and other statutory provisions in the CEA. In our view, the proposed rule is vulnerable to legal challenge as exceeding the Commission's authority. First, the provision is inconsistent with the definition of member property in Section 761(16) of the Code. Section 761(b) defines "member property" as "customer property received, acquired, or held by or for the account of a debtor that is a clearing organization, from or for the proprietary account of a customer that is a clearing member of the debtor." The DCO's rules define how clearing members' guaranty fund deposits are applied to cover losses in respect of clearing members' customer accounts and whether the DCO holds any remaining on behalf of members' proprietary accounts, to be returned to clearing members as member property. Overriding those rules would be contrary to the Code's member property definition.

Second, the proposed rule is contrary to the framework established by the CEA for the registration, regulation, and oversight of DCOs. As required under CEA Section 5b, DCOs must adopt and enforce rules to comply with the DCO core principles and with regulations adopted by the CFTC to implement the core principles. Moreover, Section 5b gives DCOs reasonable discretion to establish the manner in which they comply with those requirements. The CFTC is proposing to rewrite how rules adopted by DCOs will be applied in the circumstances of the bankruptcy event of the DCO, in disregard of the fact that the Commission has allowed DCOs to adopt those very rules under and subject to its regulatory supervision. The CEA gives the Commission the authority to adopt rules with which DCOs must comply; we are not aware of any CEA provision that gives the CFTC the right to adopt rules that have the effect of directly rewriting a DCO's rules.[10]

We also question the Commission's legal authority unilaterally to amend the binding contract among clearing members and the DCO by the fiat of a Commission rule. Such precedent would be extremely troubling, as it would raise the prospect that the CFTC could seek to directly amend other DCO rules through adoption of its own rules, in lieu of following the DCO oversight structure laid out in the CEA, which assigns responsibility to the DCOs to adopt the frontline rules they are responsible for enforcing as self-regulatory organizations, subject to the Commission's oversight. That would call into question more generally the enforceability of the DCOs rules as the contract with its clearing members.

We are also concerned that a proposed rule impacting the manner in which bank or bank-affiliated clearing members' guaranty fund deposits and assessment obligations can be utilized may drive subsequent changes to the methodology and resulting amount of capital such members must hold for those exposures under the Cleared Transactions Framework in the Regulatory Capital Rules. In light of the fact that the bank capital rules have only recently been amended to provide appropriate capital efficiencies for banks participating in the cleared derivatives markets, we strongly caution against exposing clearing member guaranty fund deposits and assessment obligations in a manner that could undermine these positive steps. As observed until recently with the lack of customer initial margin offset under the leverage ratio, increases to bank capital requirements in cleared derivatives markets have the unintended consequence of reducing client and clearing member access to the hedging and risk mitigation benefits of those markets.

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[10] To the contrary, the Commission's authority under CEA Section 8a(7) to alter or supplement the rules of a registered entity, including those of a DCO, is subject to special procedural requirements unrelated to the Commission's rulemaking authority. Under Section 8a(7), the Commission must request the registered entity to amend its rules and provide the registered entity with notice and an opportunity for hearing if it does not make the changes, before the Commission may then itself alter or supplement the registered entity's rules. If the Commission were to request a DCO to change its rules, presumably it would first have to conclude that the DCO's rules do not comply with CEA Section 5b, the Part 39 rules, or other CEA provisions or Commission rules.

For the foregoing reasons, the Commission should revise the proposed rule to eliminate this feature and to reaffirm that guaranty fund deposits are to be applied to cover losses in accordance with the DCO's rules, with any remaining funds allocated to member property.

If the Commission wants to mandate that guaranty fund deposits be applied to cover losses outside the scope of mutualized losses provided for in a DCO's rules, it should propose amendments to Part 39 that would direct DCOs to amend their rules accordingly. That approach will allow for meaningful debate around the merits of the proposal and the complex issues and potential adverse implications it raises. For example, we think such a change could discourage firms from becoming clearing members for the purpose of self-clearing their own trades, limiting their choices for accessing clearing services, and could raise implications for bank and bank-affiliated clearing members as described above.

Addressing the matter through Part 39 rule amendments would also assure that if such a policy change is adopted, it will apply to all DCOs. The insolvency of a foreign DCO will more likely be administered under the bankruptcy laws or orderly resolution counterpart to Title II in the foreign DCO's home jurisdiction. If the policy is embedded in proposed Regulation 190.18(c)(1) it will selectively and unfairly be applied to U.S. DCOs only.

As a separate issue, CME encourages the Commission to expand the scope of customer property in proposed Regulation 190.18(b) to explicitly include amounts that the DCO commits to the financial resources waterfall under its rules, to the extent those resources have not already been applied under the DCO's default rules. We believe this may be covered indirectly via cross reference to a provision in proposed Regulation 190.09(a)(1) that would cover property of the debtor that it is required "to set aside for the benefit of customers" under "any applicable law, rule, regulation, or order requires to be set aside for the benefit of customers." For clarity and transparency, we favor a more direct approach that would expressly cover the DCO's financial commitments within the text of Regulation 190.18.

Subject to our comments above regarding calculation of net equity claims with respect to house accounts and use of clearing members' guaranty fund deposits, CME is supportive of the proposal in Regulation 190.18 with respect to allocating any excess funds available to satisfy claims in respect of clearing members' house or customer accounts within an account class – first to cover any shortfall in the funded balance to satisfy claims of public customers in any account class, and then to satisfy any shortfall in the funded balance to satisfy claims of non-public customers in any account class.

I. Proposed Regulation 190.19: Supporting Daily Settlement

CME believes the provisions in proposed Regulation 190.19 are appropriate to support the daily settlement cycle when the trustee obtains the Commission's approval to continue operating the DCO.

V. Conclusion

CME appreciates the opportunity to submit comments on this important rulemaking initiative. We commend the Commission for its careful reevaluation of the existing Part 190 rules, and for proposing thoughtful, comprehensive amendments that in our view will modernize the rules; improve understanding of the rules by trustees, bankruptcy courts and other interested parties; and enhance customer protections. We do, though, ask the Commission to make certain revisions to the proposed subpart A and subpart B rules, as discussed above.

We encourage the Commission to consider separate rulemaking to adopt requirements (in the Part 1 Regulations, not in Part 190) with respect to delivery accounts. We appreciate that the operational aspects for completing the delivery process can be complicated and can vary across types of physical delivery futures or options contracts. We are open to a dialogue with Commission staff to discuss how deliveries occur, the types of deliveries we see occurring through delivery accounts, and unique considerations that certain contracts can raise, such as oil futures where delivery occurs by physical movement of the oil and buyers post letters of credit in substantial amounts to secure obligations to pay for delivery when it occurs on a forward delivery basis.

CME also supports establishing a separate framework for a DCO bankruptcy. Well-crafted subpart C rules will fill a major void in current Part 190. We do, though, request some changes to promote clarity on the important issues of ensuring enforceability of DCO close-out netting rules and ensuring that DCO loss allocation rules are properly applied to the calculations of clearing members' house net equity claims. As discussed above, we disagree with the Commission's proposed treatment of clearing members' guaranty fund deposits and urge the Commission to eliminate that provision. We question the Commission's authority to adopt a rule that would render ineffective any DCO rules that are contrary to the Commission's. If the Commission wants to change how guaranty fund deposits are applied to cover losses under DCO rules, it should propose amendments to Part 39 that would direct DCOs to amend their rules accordingly. That approach would assure that the requirements if adopted will apply to all registered DCO, U.S. and non-U.S. alike, and will allow for meaningful public comment on the complicated issues that we think such a proposal would raise. We would welcome the opportunity to discuss those issues and our concerns with Commission staff.

If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,

Sunil Cutinho
President, CME Clearing

cc: Chairman Heath P. Tarbert, Commodity Futures Trading Commission
Commissioner Brian Quintenz, Commodity Futures Trading Commission
Commissioner Rostin Behnam, Commodity Futures Trading Commission
Commissioner Dawn Stump, Commodity Futures Trading Commission
Commissioner Dan Berkovitz, Commodity Futures Trading Commission
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